

**Draft Response to Comments from 10/20/09 Board Hearing  
Water Quality Enforcement Policy**

11/05/09

Comment Category	Commenter	Comment #	Comment Summary	Response
General	2.2	1 - Gen	- Appreciate staff effort - great process - Appreciate changes to assist small and/or disadvantaged communities - Support CASA & Tri Tac Comments	Noted
General	21	19	Staff did not provide any response to comments for public review. We request the Board table any decision on adopting the revised draft Policy until staff have provided the public with their response to comments.	Responses to comments were provided at the Board Hearing and posted on the internet thereafter. The board hearing on the Enforcement Policy will be continued on November 17, 2009.
General	22	1	U. S. EPA supports adoption of the policy.	Noted.
1.E.Small Communities	3	5	Numerous new changes were made on Pages 3 et seq. with regard to the definition of "small communities" that make this definition less, not more, clear. - To avoid the continued confusion that the new changes apparently were designed to address, we requested that the definition of "small communities" in Section 13385 (k)(2) be both quoted and cited in the Policy.	We disagree that the change, to match the definition of "small community" to that described in the Small Community Wastewater Strategy, is confusing. This section of the Policy is intended to address the same matters as are addressed in the Small Community Wastewater Strategy.
1.E.Small Communities	17	3	RCRC is happy with the process and likes the parity of the Enforcement Policy with the Small Community Wastewater Strategy. More time to review the changes made in responses would be appropriate.	Noted. This item will be continued until the November 17, 2009 Board meeting.
2. A. Ranking Violations	21	15	We requested staff incorporate a requirement that evidence for a given violation classification be made available in the public record and presented by Water Board staff as part of the enforcement process. Without evidence being made publicly available, the regulated community could be subject to enforcement action penalties without evidence that such are warranted or justified. We request the Board incorporate a requirement that evidence be placed in the public record.	The commenter is confusing two different processes. One for ranking violations and one for presenting information in support of a formal enforcement action. Should a matter be brought for formal enforcement, the information leading to the prioritization of the violation will be addressed and available to the discharger.
2. E. Mandatory Enforcement Actions	1	7	Adopt language in the Enforcement Policy that requires staff to notify permit holders of alleged violations within 30 days after the violation occurred (i.e. within 30 days after the monitoring report is due).	The MMP statutes do not require notification of a violation by the Water Boards before a violating discharger is liable and the Policy will not include a requirement that may be misconstrued as an amendment of a discharger's liability under the statute.

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2. E. Mandatory Enforcement Actions	21	16	<p>a. We request the Board incorporate language clarifying that enforcement actions be conducted either under the MMP program or ACL, but not both.</p> <p>b. In addition, absent heightened or unusual circumstances that warrant enforcement under the ACL program, we believe that MMPs represent an appropriate enforcement response and we request that such language also be incorporated.</p>	<p>a. This comment is ambiguous in that a mandatory minimum penalty is also an administrative civil liability. We assume that the commenter is concerned about the mandatory assessment versus the discretionary assessment. The Policy does not need to be clarified in this regard because the Water Boards are not authorized to bring an enforcement action for the same violation as an MMP and as a higher discretionary administrative civil liability.</p> <p>b. MMPs represent the legally required response to situations detailed by the statute. The Water Boards evaluate circumstances on a case-by-case basis to determine whether this is the appropriate response.</p>
3. ENFORCEMENT ACTIONS	3	4	<p>In our letter dated September 16th, we requested that the Board delete the proposed change that limits tracking in the State's enforcement database of violators' return to compliance only "where appropriate" (see top of Page 9 on prior version, and page 8 of current version, in Section III).</p> <p>- We request that the new "where appropriate" either be deleted, or specifically defined so that the regulated community and the public know how the State Water Board is differentiating truly discretionary reporting requirements from Section 13385 (o) reporting mandates.</p>	<p>The words "where appropriate" were deleted from this section of the Policy.</p>

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6. A. Penalty Calculation Methodology	2.1	1	<p>The revised policy includes a major redraft of one of the most critical pieces of the policy, the penalty calculation section. Beginning on pg 12, the harm factors have been completely rewritten and have moved from relatively concrete measures to vague and extremely speculative criteria. These types of "squishy", undefined factors are even less acceptable because of the provision on pg 11, where this Board would as a matter of policy and, not on a case by case basis, defer to the Regional Boards' calculations of liability amounts and not take up petitions regarding monetary penalties. These provisions, taken together, insulate the Regional Boards from any review of their actions.</p> <p>We request either:</p> <p>a. the deletion of the paragraph on pg. 11 re: deference to Regional Boards, or</p> <p>b. remove problematic language from pgs. 12-15.</p>	<p>a. The Board retains authority to review penalty determinations based on error of law or abuse of discretion. The Board language is designed to indicate that the Board does not want or intend to review mere disagreements regarding the amount of penalty that a regional board has determined to impose using the methodology in this policy. The deference expressed in this policy is consistent with law. In response to this comment, the word "generally" was added to the following sentence: "the State Water Board will "generally" defer to the decisions made by the Regional Water Boards ..."</p> <p>b. Many of the suggested language changes were made. Please see the response to Commenter 2.1, Comment #3 for details.</p>

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6. A. Penalty Calculation Methodology	2.1	3	Commenter provided some language changes in the form of an underline / strikeout markup of the Policy. The proposed language changes are broken into various sections titled Amendments 1-8.	<p>Amendment 1 - the word "plausible" was changed to "reasonably expected"</p> <p>Amendment 2 - The term "potential receptors" was defined in the preamble for Factor 2 as follows: "For purposes of this Policy, "potential receptors" are those identified considering human, environmental and ecosystem health exposure pathways."</p> <p>Amendment 3: On pages 15 - 18, language stating: "there are significant consequences associated with the violations" was deleted from each of the definitions for the categories for "Deviation from Requirement".</p> <p>Amendment 4: Suggested relocation of Policy language was made.</p> <p>Amendment 5: See response to Commenter 2.1 - Comment # 9</p> <p>Amendment 6: The identified text was stricken from the Policy. In addition, similar language on page 21 of the draft was also stricken.</p> <p>Amendment 7: See response to Commenter 2.3, Comment #3</p> <p>Amendment 8: See response to Commenter 2.2, Comment #3</p>
6. A. STEP 2 - Assessments for Discharge Violations	2.3	1	The Location of NPDES effluent limit base liability should be located at beginning of Step 2 - page 14, or end of page 17, before Step 3	This text has been moved to the beginning of Step 2 page 14.
6. A. STEP 2 - Assessments for Discharge Violations	2.2	1	<p>Concern with \$1/gal value recycled water</p> <ul style="list-style-type: none"> <li>- This sends wrong message</li> <li>- The Water Board should promote the use of recycled water</li> <li>- Recycled water is a resource</li> <li>- Consider lowering the value to \$0.25 or \$0.50</li> </ul>	The policy is intended to provide a consistent approach to violations while recognizing that there are differences in the quality and impact of the violations. The policy already allows for a lower starting value for spills of recycled water. Other factors in the policy may be used where the actual impact in a particular case is relatively small.

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6. A. STEP 2 - Assessments for Discharge Violations	21	17	<p>Step 2: The draft Policy allows for both per day and per gallon assessments. This could lead to essentially double penalties for large volume dischargers without a demonstration that environmental impacts warrant such.</p> <p>We request the Board replace the "and" for an "or" in the Policy so that penalties are assessed either on a daily or a per gallon basis.</p>	<p>The following language has been added to the policy to clarify that per day and per gallon penalties will only be assessed where deemed appropriate and in accordance with the law:</p> <p>"Generally, it is intended that effluent limit violations be addressed on a per day basis. Where deemed appropriate, such as for a large scale spill or release, it is intended that Table 2 be used in conjunction with Table 1, so that both per gallon and per day amounts be considered under Water Code section 13385."</p>
6. A. STEP 4 - Adjustment Factors	2.2	2	<p>Requests the Water Board revert to prior version of language in Step 4, pg 19, item c, concerning adjustment factors for multiple violations</p> <ul style="list-style-type: none"> <li>- As it was written, it allowed the Water Board to consider at its discretion from a single event that occurred over multiple but discontinuous days as a single violation</li> <li>- The language was appropriate and needed, but the changed language removes this option. Please revert to the prior language.</li> </ul>	<p>The referenced change only served to make the Policy more readable and does not limit the board's ability to consider a violation that occurs over multiple but discontinuous days as a single violation.</p>
6. A. STEP 6 - Ability to Pay and Ability to Continue in Business	2.3	2	<p>Upward Adjustment of Ability to Pay</p> <ul style="list-style-type: none"> <li>- This is contrary to fair / consistent enforcement</li> <li>- contravenes appropriate penalty calculation</li> <li>- requires RWQCB to delve into financial issues that have not been previously involved (unless an ability to pay argument for downward adj. assessed by discharger)</li> </ul> <p>We request that you strike the sentence starting with "Similarly ..."</p>	<p>The requested deletion has been made.</p>

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6. A. STEP 6 - Ability to Pay and Ability to Continue in Business	3	6	The new language on pages 20-21 unnecessarily weakens the Boards' ability to set meaningful penalties. The change on the bottom of page 20 inexplicably places the onus on the Boards to examine whatever information might be at their disposal with regard to a violator's financial condition and potentially adjust penalties accordingly. The prior language, which required the violator to affirmatively bring this information to the Board for possible consideration, appropriately circumscribes the Board's potential workload and should be reinstated. Moreover, the change on page 21 deleting the language: "The extent or degree of adjustment for ability to pay or ability to stay in business ..." significantly and unnecessarily weakens the Boards' ability to set meaningful penalties. This deleted language should be reinstated to preserve the Boards' ability to protect water quality from repeat violations.	The referenced changes were made to comport with the legal obligations of the Water Boards in administrative civil liability proceedings.
6. A. STEP 6 - Ability to Pay and Ability to Continue in Business	21	18	Step 6 provides for an increase in penalty based solely on staff judgment, whereas it should be based on recovery of Economic Benefit. We request the Board remove the language allowing penalties to increase based on the dischargers ability to pay, and insert language from our WSPA comment letter to focus Step 6 on Economic Benefit.	The language specifying that penalties may be increased based on the dischargers' ability to pay was removed from the Policy.
7. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS	2.1	9	The provisions relating to detection levels and MMPs are contrary to statute and therefore not lawful. On pg. 30, the Policy provides that any discharge that exceeds the minimum level is a serious violation . . . but that is not what the Water Code provides. The Water Code states that a "serious violation" means any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements for a Group II pollutant by 20 percent or more, or for a Group I pollutant by 40 percent or more. The statute does not establish an MMP for exceeding a minimum level. While the SWRCB can assess discretionary penalties for exceeding the minimum level under the SIP, the Water Board cannot expand the definition of the violations subject to MMPs.	Section VII.E. will be edited to address this comment.

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7. D. Defining a "Discharge Monitoring Report" in Special Circumstances Under California Water Code 13385.1	1	5	Commenter encourages the Board to adopt the proposed language for Section D.2, "Defining a Discharge Monitoring Report where There is No Discharge to the Waters of the US."	Noted.
7. D. Defining a "Discharge Monitoring Report" in Special Circumstances Under California Water Code 13385.1	1	6	<p>Modify the Policy with regard to applying MMPs to those circumstances where a discharge monitoring report was not filed in a timely manner but monitoring was conducted, and while dischargers did occur, the discharges did not exceed effluent limitations.</p> <p>Commenter encourages the Board to modify the proposed policy to recognize that the situation described does not constitute a "serious violation" for purpose of imposing MMPs.</p>	This is completely contrary to the statute as it requires the Water Board to impose an MMP when the report is late, regardless of what's reported once it's finally received.
Appendix A	2.3	3	The new language appears to circumvent Stormwater Enforcement Act requirements.	To the extent that enforcement results from violations of an NPDES permit, those violations can be enforced pursuant to section 13385. In any case, the Policy does not circumvent the Storm Water Enforcement Act as that chapter expressly provides that it "supplements, and does not supplant, other laws relating to the discharge of storm water." (Water Code section 13399.25)
Appendix A	3	7	Page 40 of the Policy adds the following new language, "It is the policy of the State Water Board that a 30 day public comment period should be posted on the Boards' website prior to the settlement or imposition of any ACL, including mandatory minimum penalties, and prior to settlement of any judicial civil liabilities." We request that the Policy specifically cite the quote 13323(e) on page 40, and make clear that while it is the policy of the Board to select a 30-day comment period, the law requires the posting of proposed ACLs to the public in advance of the ACLs hearing.	In the quoted language from page 40 of the Policy, the word "should" was changed to shall" to make it clear that this posting is mandatory.

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Appendix B	2.2	3	<p>They have concerns with the performance measure for compliance rates</p> <ul style="list-style-type: none"> <li>- % of facilities in compliance is only based on the number of facilities evaluated</li> <li>- This skews the true compliance &amp; effectiveness of the Water Board Programs</li> <li>- Many agencies have 1000's of requirements over the year, one violation would trigger this facility into non-compliance, even though their actual compliance rate may be upward of 99%</li> <li>- They suggest different measures such as the language suggested in the Clean Water Associations letter or another matrix that better defines actual compliance</li> </ul>	<p>Although we are moving in this direction, our data limitations make this approach extremely complicated. Our presentation of compliance rates is consistent with that of US EPA. Our current approach is a significant improvement over past practices because it allows us to classify and categorize facilities with compliance problems. Compliance rates are currently displayed in groupings of 1-11 violations, 11-25 violations and greater than 25 violations (see 13385 reports at: <a href="http://www.waterboards.ca.gov/water_issues/programs/enforcement/">http://www.waterboards.ca.gov/water_issues/programs/enforcement/</a>).</p>